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FILED-DISTRICT COURT
CASE # _____

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Attorneys for Petitioner A&B Irrigation District

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF MINIDOKA**

A&B IRRIGATION DISTRICT,

Petitioner,

vs.

**THE IDAHO DEPARTMENT OF WATER
RESOURCES,**

Respondent.

IN THE MATTER OF THE PETITION FOR
DELIVERY CALL OF A&B IRRIGATION
DISTRICT FOR THE DELIVERY OF
GROUND WATER AND FOR THE
CREATION OF A GROUND WATER
MANAGEMENT AREA

)
) CASE NO. CV 2008 - 465
)

) Fee Category R.2 - \$78.00
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) **NOTICE OF APPEAL AND**
) **PETITION FOR JUDICIAL**
) **REVIEW OF AGENCY ACTION**
)

COMES NOW, the Petitioner A&B Irrigation District ("A&B"), by and through its undersigned counsel, and hereby files this Petition as follows:

STATEMENT OF THE CASE

1. This is a civil action pursuant to Idaho Code §§ 67-5255, 5270, and 5279 seeking judicial review of a declaratory ruling of the Respondent Idaho Department of Water Resources issued on May 26, 2008.

2. A&B petitions this Court for an order finding that the Respondent erred as a matter of law in determining that the 1951 Ground Water Act applies to A&B's senior decreed ground water right number 36-2080 with a priority date of September 9, 1948.

JURISDICTION AND VENUE

3. This petition is authorized by Idaho Code §§ 67-5255, 5270, and 5279.

4. This Court has jurisdiction over this action pursuant to Idaho Code §§ 42-1401D and 67-5272.

5. Venue lies in this Court pursuant to Idaho Code §§ 42-1701D and 67-5272. A&B's principal place of business is located in Minidoka County and the real property (water right number 36-2080) which was the subject matter of the agency action is appurtenant to lands located in Minidoka and Jerome counties.

6. The Respondent's May 26, 2008 declaratory ruling is a final agency action subject to judicial review pursuant to Idaho Code §§ 67-5255(3) and 67-5270(2).

PARTIES

7. Petitioner A&B is an Idaho irrigation district, with its principal office located in Minidoka County, specifically Rupert, Idaho.

8. Respondent Idaho Department of Water Resources is a state agency with its main office located at 322 E. Front St., Boise, Idaho.

AGENCY RECORD

9. Judicial review is sought of the Respondent's May 26, 2008 *Order Regarding Motion for Declaratory Ruling*.

10. The Respondent held oral argument on A&B's *Motion for Declaratory Ruling* on May 2, 2008, which was recorded and a transcript created, which transcript should be made a part of the agency record in this matter. The person who may have a copy of such transcript is Victoria Wigle, Director's Administrative Assistant, Idaho Department of Water Resources, 322 E. Front St., P.O. Box 83720, Boise, Idaho 83720-0098, Telephone: (208) 287-4803, Facsimile: (208) 287-6700, email: victoria.wigle@idwr.idaho.gov. A&B will pay the necessary fee for preparation of the transcript at the time the agency record is prepared in this matter.

11. Petitioner anticipates that it can reach a stipulation regarding the agency record with the Respondent, and will pay the necessary fee for preparation of the record at such time.

12. Service of this Petition for Judicial Review of Agency Action has been made on the Respondent at the time of the filing of this Petition.

STANDARD OF REVIEW

13. The agency's erroneous conclusions of law may be corrected on appeal. *Homestead Farms v. Teton County Board of Commr's*, 141 Idaho 855, 859 (2005); *Greenfield Village Apartments v. Ada County*, 130 Idaho 207, 209 (1997); *St. Joseph Regional Med. Ctr. v. Nez Perce County Comm'rs*, 134 Idaho 486, 488 (2000). Such review on questions of law is de novo.

BACKGROUND

14. A&B Irrigation District is the beneficial owner of water right 36-2080 which entitles A&B to divert 1100 cfs of groundwater from the Eastern Snake Plain Aquifer ("ESPA") through 177 wells and pumps throughout portions of Minidoka and Jerome Counties for the irrigation of 62,604.3 acres within the irrigation district. Water right 36-2080 was decreed by the Snake River Basin Adjudication (SRBA) District Court on May 7, 2003. The water right has a priority date of September 9, 1948.

15. On July 27, 1994, A&B filed a *Petition for Delivery Call* with the Idaho Department of Water Resources, seeking priority administration of its senior ground water right 36-2080. Following the pre-hearing conference, on May 1, 1995, the Department issued a *Pre-Hearing Conference Order* on May 1, 1995. The proceeding was stayed by that order. On March 16, 2007, A&B filed a *Motion to Proceed* with its water delivery call before the Department. A&B requested the Department to lift the stay previously entered and to proceed with priority administration to distribute water to A&B's senior water right 36-2080.

16. After the Department and Director failed to take any action on A&B's *Motion to Proceed*, A&B filed a *Petition for Peremptory Writ of Mandate* in district court on August 23, 2007 (A&B Irrigation District v. Tuthill et al., Case No. CV-2007-665, Fifth Jud. Dist., Minidoka County). Thereafter, the Director lifted the stay, set a hearing schedule, and appointed a hearing officer (Justice Gerald F. Schroeder) to preside over the matter on October 19, 2007. The District Court followed up with a *Memorandum Decision re: Respondent's Motion to Dismiss* on October 29, 2007, whereby the Court denied the Respondent's motion to dismiss and granted A&B's request for a preemptive writ of mandate. The Court ordered the Director to

make a determination of material injury on or before January 15, 2008, which deadline was later extended to January 29, 2008.

17. On January 29, 2008 the Director issued an *Order* responding to A&B's water right delivery call. A&B then filed a petition challenging and requesting a hearing on that order on February 13, 2008. By agreement amongst the parties, the hearing on A&B's petition is scheduled for December 3 – 17, 2008.

18. On March 21, 2008 A&B filed a *Motion for Declaratory Ruling* pursuant to Rules 260 and 565 of the Department's Rules of Procedure (IDAPA 37.01.01 *et seq.*) seeking an order establishing the applicable law to A&B's Petition for a Delivery Call of ground water pursuant to its decreed water right number 36-2080, and the administration of that right. The Idaho Ground Water Appropriators, Inc. and the City of Pocatello filed responses to that motion on April 11 and April 14, 2008 and A&B then filed a reply brief on April 25, 2008. Oral argument on A&B's motion was held on May 2, 2008.

19. On May 26, 2008 the Hearing Officer issued an *Order Regarding Motion for Declaratory Ruling*. Pursuant to Idaho Code § 67-5255(2) and Rule 402 of the Department's Rules of Procedure, the *Order* is a final agency action subject to judicial review. Pursuant to Rule 51 of the Department's Rules of Procedure, the definition of the "agency" includes the Hearing Officer.

FIRST CLAIM FOR RELIEF

(Respondent's Order is Erroneous as a Matter of Law)

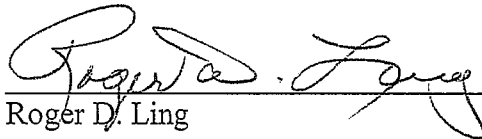
20. A&B repeats the allegations of paragraphs 1-19, inclusive, as if set forth fully herein.

21. Respondent's Order of May 26, 2008, concluding that the 1951 Ground Water Act, Idaho Code § 42-226 *et seq.*, applies to A&B's decreed ground water right number 36-2080 with a priority date of September 9, 1948 is erroneous as a matter of law.

WHEREFORE, A&B prays that his Court:

1. Enter an order in favor of A&B and against Respondent with respect to A&B's claim;
2. Reverse Respondent's May 26, 2008 Order in whole;
3. Remand the matter to Respondent with directions to comply with the Court's order; and
4. Award such other and further relief which this Court deems just and equitable.

DATED this 20th day of June 2008.


Roger D. Ling

BARKER ROSHOLT & SIMPSON LLP


Travis L. Thompson

Attorneys for Petitioner A&B Irrigation District

CERTIFICATE OF SERVICE

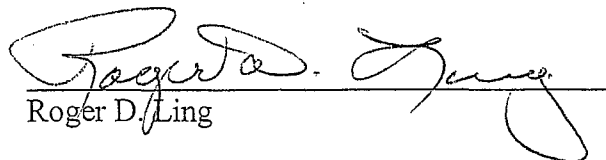
I HEREBY CERTIFY that on the 20th day of June, 2008, I served true and correct copies of the *Notice of Appeal and Petition for Judicial Review of Agency Action* by U.S. Mail, postage prepaid, upon the following:

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Minidoka County District Court
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